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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HERNAN RAMIREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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8 pp

TABLE OF AUTHORITIES

Cases:	Page
Dorman v. *United States*, 435 F.2d 385 (D.C. Cir. 1970)	3, 4
Richards v. *Wisconsin*, No. 96-5955 (Apr. 28, 1997)	5
Sabbath v. *United States*, 391 U.S. 585 (1968)	4
Stevens v. *Department of Treasury*, 500 U.S. 1 (1991)	2
United States v. *Brown*, 52 F.3d 415 (2d Cir. 1995), cert. denied, 116 S. Ct. 754 (1996)	3
United States v. *Maden*, 64 F.3d 1505 (10th Cir. 1995)	3
United States v. *McConney*, 728 F.2d 1195 (9th Cir.), cert. denied, 469 U.S. 824 (1984)	2
United States v. *Stewart*, 867 F.2d 581 (10th Cir. 1989)	3
United States v. *Wells*, 117 S. Ct. 921 (1997)	1
United States v. *Williams*, 504 U.S. 36 (1992)	1, 3
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991)	1-2
Wilson v. *Arkansas*, 115 S. Ct. 1914 (1995)	4
Constitution and statute:	
U.S. Const. Amend. IV	4
18 U.S.C. 3109	4
Miscellaneous:	
Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693 (1995)	3

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent contends that the government waived its right to challenge the Ninth Circuit's two-tiered approach in this Court because it did not directly challenge that rule until seeking rehearing and suggesting rehearing en banc. This Court's traditional rule, however, "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). "That * * * rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *United States* v. *Wells*, 117 S. Ct. 921, 925-926 (1997); *Virginia Bankshares, Inc.* v.

Sandberg, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991). The court of appeals clearly "passed upon" the issue that is presented in the petition; it explicitly applied a two-tier approach to unannounced entries that requires more specific inferences of exigency when the entry involves physical destruction of property. Pet. App. 8a.

The government's acquiescence in the two-tier rule until the rehearing stage does not provide a basis for denying review as a matter of discretion. The two-tier rule represented established Ninth Circuit precedent, under an en banc decision of many years' standing. *United States* v. *McConney*, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).[1] The district court had no authority to depart from that rule, and the government could not have prevailed on its initial appeal by challenging it before the panel. The government did, however, challenge that rule at the rehearing stage, giving the en banc Ninth Circuit the opportunity to reconsider its rule. There is therefore no merit to respondent's

[1] In *McConney*, the en banc court of appeals upheld an unannounced entry based on its conclusion that a "mild exigency" was sufficient to justify an entry that did not involve property destruction. 728 F.2d at 1206. Because it prevailed in *McConney*, the government had no opportunity to seek review of the court's two-tier standard. And, when McConney filed a petition for a writ of certiorari challenging the "mild exigency" holding, the government urged that certiorari be denied because, "under any standard, exigent circumstances fully justified the officers' actions here." Memorandum for the United States in Opposition at 3, *McConney* v. *United States*, No. 83-1884 (O.T. 1984). Moreover, as respondent notes (Br. in Opp. 14-15 & n.3), in the intervening years, the government generally prevailed even under the two-tier standard.

contention that the petition should be denied because of an alleged waiver. Cf. *United States* v. *Williams*, 504 U.S. at 44-45.

2. Respondent argues (Br. in Opp. 9) that there is no circuit conflict over the Ninth Circuit's two-tiered approach because "[t]he government fails to cite a single case that has ever even questioned the Ninth Circuit's approach, much less rejected it." Although circuit conflicts may be noted explicitly by the lower courts, such overt recognition is not a necessary precondition for a conflict, since one exists "when two courts have articulated plainly inconsistent statements of law and have used them to reach different results on the same issue." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 712 (1995). As we demonstrate in our petition for a writ of certiorari (Pet. 18-21), no other court of appeals focuses on damage to property as the key determinant requiring greater specificity of proof to justify an unannounced entry by law enforcement officers.[2] Thus, contrary to respondent's claim, the

[2] Respondent relies on *United States* v. *Stewart*, 867 F.2d 581, 584 (10th Cir. 1989); *United States* v. *Brown*, 52 F.3d 415, 421 (2d Cir. 1995), cert. denied, 116 S. Ct. 754 (1996); and *Dorman* v. *United States*, 435 F.2d 385, 393 (D.C. Cir. 1970). As we note in our petition (Pet. 20 & n.9), however, a subsequent decision by the Tenth Circuit has held that *Stewart* imposed no requirement that a "specific showing" is needed. See *United States* v. *Maden*, 64 F.3d 1505, 1509 n.2 (1995). Similarly, respondent does not take issue with our explanation (Pet. 20 & n.10) that the Second Circuit's decision in *Brown* does not entail a two-tier inquiry—either in its articulation of the governing multi-factor test or in its application of that standard. And *Dorman* cannot be construed to require a specific (and

consideration of property damage by the other courts of appeals is "plainly inconsistent" with the Ninth Circuit's requirement of a greater showing on the government to justify such an entry when property has been destroyed.

3. Respondent further contends (Br. in Opp. 15-26) that the outcome below was correct for alternative reasons. Those contentions are either irrelevant or without merit. The court below assumed the existence of probable cause in rendering its decision on the knock-and-announce issue, see Pet. App. 12a n.1, and the district court properly rejected respondent's submission that probable cause for the warrant was lacking, see *id.* at 28a. The court of appeals' decision not to reach the probable cause issue does not preclude this Court's review of the appropriate principles to apply when law enforcement officers make a "no-knock" entry. Similarly, respondent's challenge to the magistrate judge's jurisdiction to issue an appropriate warrant is misplaced. Not only did respondent not raise this issue below, but the legal principle presented in the petition should be decided irrespective of what judicial officer has the appropriate authority to issue the search warrant. Finally, respondent suggests (Br. in Opp. 21) that "Section 3109 contains no exception for danger to the officers executing the warrant." That contention, however, misunderstands the balancing of interests inherent in Section 3109's codification of Fourth Amendment and common-law principles. See Pet. 10-11 & n.3 (discussing *Wilson* v. *Arkansas*, 115 S. Ct. 1914, 1918 n.3 (1995); *Sabbath* v. *United States*, 391 U.S. 585, 591 n.8 (1968)).

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higher) showing if the entry will involve even de minimis destruction of property. See 435 F.2d at 393.

4. In seeking to defend the correctness of the court of appeals' judgment, respondent relies (Br. in Opp. 26-34) on a totality-of-the-circumstances inquiry. That approach, however, is not the theory of the court of appeals. Critical to the Ninth Circuit's unique rule is the principle that property damage significantly elevates the threshold showing needed to justify an entry without compliance with the knock-and-announce requirement; the "mild exigency" sufficient to justify no-knock entries without property damage is not enough. The issue that warrants review by this Court is whether the two-tier standard *should* govern the analysis. We submit that it should not.

The Ninth Circuit's rule erroneously makes the need to damage property dictate the showing of whether it is "reasonable" for officers to enter without a prior announcement. As this Court explained in *Richards* v. *Wisconsin*, No. 96-5955 (Apr. 28, 1997), slip op. 8:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

If the police lack such a reasonable suspicion, an unannounced entry is not permitted. But if the police have such a reasonable suspicion, officers are permitted to effect a sudden entry—and thus protect their own and others' safety or preserve the objects of the search—whether or not some breakage of property is required.

Although respondent expresses the view that it is generally safer to knock and announce, the judgment of law enforcement officers is that avoidance of danger is often best achieved when officers quickly take control of the situation in a no-knock entry. The Ninth Circuit's rule thus inhibits law enforcement practices that reduce risks in the execution of warrants. See Pet. 21. The holding below magnifies the problems in the Ninth Circuit's rule, because the destruction of property was de minimis—a broken garage door windowpane—and the fugitive sought by the officers had already harmed other innocent persons. The court's decision thus improperly minimizes the legitimate and reasonable interests of law enforcement officers by imposing a two-tier showing every time the execution of a search warrant in a "no-knock" circumstance results in damage to property. Because there is no reason that officers operating in the jurisdiction of the Ninth Circuit alone should have to face enhanced risks, this Court's review is warranted.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MAY 1997